No. 92-5257-CFY
Status: DECIDED

Title: Robert Wayne Bouvier, Petitioner
v.
United States

Docketed:
July 23, 1992

Court: United States Court of Appeals for the Fifth Circuit

Vide:
92-5184
92-5188

Counsel for petitioner: Wright,David A.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Jul 23 1992	D	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Aug 19 1992		Order extending time to file response to petition until September 28, 1992.
5	Sep 9 1992		Brief of respondent United States in opposition filed. VIDED.
6	Sep 10 1992		DISTRIBUTED. September 28, 1992
8	Oct 5 1992		REDISTRIBUTED. October 9, 1992
10	Oct 13 1992		REDISTRIBUTED. October 16, 1992
12	Oct 15 1992	X	Reply brief of petitioner filed.
13	Oct 26 1992		REDISTRIBUTED. October 30, 1992
15	Nov 2 1992		Petition DENIED. Dissenting opinion by Justice White with whom Justice Blackmun joins. (Detached opinion.)

****

EDITOR'S NOTE

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NO. 92-5257

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

Supreme Court, U.S.
FILED
JUL 23 1992
OFFICE OF THE CLERK

Robert Wayne Bouvier, Petitioner

vs.

United States of America, Respondent

APPELLANT ROBERT WAYNE BOUVIER'S MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Comes now Petitioner, Robert Wayne Bouvier, by and through his Court-Appointed Attorney, David A. Wright, and pursuant to Rule 39, Supreme Court Rules, moves this court to allow him to proceed in *forma pauperis*.

In support of that request, Counsel for Petitioner states that he has been court appointed under the Criminal Justice Act by the District Court for the Western District of Texas, Austin Division, and the United States Court of Appeal for the Fifth Circuit. Rule 39(1), Supreme Court Rules.

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46 pp

Respectfully submitted,

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ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

Robert Wayne Bouvier, Petitioner

vs.

United States of America, Respondent

Supreme Court, U.S.
FILED
JUL 23 1992
OFFICE OF THE CLERK

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Washington, D.C. 20530
July 22, 1992

NO. 92-5257

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

Robert Wayne Bouvier, Petitioner

vs.

United States of America, Respondent

QUESTION PRESENTED:

WHETHER THE WEIGHT OF TOXIC WASTE MATERIAL, WHICH IS THE BYPRODUCT OF A DRUG MANUFACTURING PROCESS, SHOULD BE INCLUDED IN THE CALCULATION OF A DEFENDANT'S BASE OFFENSE LEVEL UNDER FEDERAL SENTENCING GUIDELINES § 2D1.1.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW vii

JURISDICTION viii

UNITED STATES SENTENCING GUIDELINE viii

STATEMENT OF THE CASE 1

ARGUMENT FOR ALLOWANCE OF THE WRIT 3

CONCLUSION 13

APPENDIX

A. FIFTH CIRCUIT JUDGMENT AND ORDER . . . . . A 1-11

B. DISTRICT COURT JUDGMENT AND SENTENCE . . . . . B 1-5

C. STIPULATION OF THE PARTIES . . . . . C 1-4

TABLE OF AUTHORITIES

INDEX OF CASES: Page

Bolling v. Sharpe, 347 U.S. 497 (1954) 11

Moskal v. United States, 494 U.S. 1026 (1990) 11

United States v. Chapman _____ v.s. _____,
111 S.Ct. 1919 114 L.Ed.2d 524 (1991) 3,4,5,6,8,3,11,12

United States v. Rodges, 466 U.S. 475 (1984) 11

United States v. Acosta
963 F.2d 551 (2nd Cir. 1992) 8,9

United States v. Baker, 883 F.2d 13 (5th Cir.),
cert. denied 493 U.S. 983 (1989) 10

United States v. Beltran-Felix
934 F.2d 1075 (9th Cir.), cert. denied
____ U.S. ____ (1992) 9,10,12

United States v. Butler, 895 F.2d 1016 (5th Cir.),
cert denied, 111 S.Ct. 82 (1990) 10

United States v. Dorrough
927 F.2d 498 (10th Cir. 1991) 10,11,12

United States v. Fowner
No. 90-2215 (10th Cir. 1991) 12

United States v. Jennings
945 F.2d 129 (6th Cir. 1991) 7,8

United States v. Mahecha-Onefre
936 F.2d 623 (1st Cir. 1991) 10,12

United States v. Mueller, 902 F.2d 336 (5th Cir. 1990) 10

United States v. Rolande-Gabriel
938 F.2d 1231 (11th Cir. 1991) 5,6,7

INDEX OF CASES CON'T: Page

United States v. Touby
909 F.2d 759 (3rd Cir.), aff'd on other grounds,
111 S.Ct 1752 (1991) 9

STATUTES AND RULES: Page

Federal Rule of Appellate Procedure 4(b) vii

Federal Sentencing Guidelines § 2D1.1 . . . . . viii,3,4

Supreme Court Rule 13.1 viii

18 U.S.C. § 3742 (a)(2) vii

21 U.S.C. § 841 . . . . . .viii,3,4,5,6,7

28 U.S.C. § 1254(1) viii,2

28 U.S.C. § 1291 . . . . . .vii,2

28 U.S.C. § 2101(c) viii

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

Robert Wayne Bouvier, Petitioner

vs.

United States of America, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Robert Bouvier respectfully petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fifth Circuit.

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

Robert Wayne Bouvier, Petitioner

vs.

United States of America, Respondent

OPINION BELOW

On July 18, 1991, the United States District Court for the Western District of Texas entered its judgment sentencing Robert Bouvier to a term of TWO HUNDRED AND TEN (210) MONTHS for conspiracy to possess with intent to distribute methamphetamine. [Docket No. A-90-R-30(1)]. (Appendix at B 1-5).

The United States Court of Appeals for the Fifth Circuit affirmed the sentencing of Mr. Bouvier in No. 91-8423 (5th Cir. April 24, 1992) (Appendix at A 1-11). That court had jurisdiction pursuant to 28 U.S.C. § 1291, 18 U.S.C. §3742(a)(2), and Federal Rule of Appellate Procedure 4(b).

JURISDICTION

On April 24, 1992, the Fifth Circuit entered the judgment that is sought to be reviewed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Pursuant to Supreme Court Rule 13.1 and 28 U.S.C. § 2101(c), this petition is timely filed if filed by July 23, 1992.

UNITED STATES SENTENCING GUIDELINES

The provisions of the United States Sentencing Guidelines involved in this case are the following:

Federal Sentencing Guidelines Manual, Section 2D1.1, Drug Quantity Table, n.* (November 1990):

> [T]he weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance.

Federal Sentencing Guidelines Manual, Section 2D1.1, Application Note 1 (Nov. 1989). which states:

> "Mixture or Substance" as used in this guideline has the same meaning as in 21 U.S.C. § 841,

STATEMENT OF THE CASE

Robert Bouvier was arrested and charged with conspiracy to possess with intent to distribute more than one hundred (100) grams of methamphetamine. Following his arrest, Mr. Bouvier entered into a Plea Agreement with the United States Attorney. The United States District Court for the Western District of Texas approved such agreement.

On July 18, 1991, the trial court sentenced Mr. Bouvier to the custody of the Bureau of Prisons for a period of 210 months in addition to a fine and period of supervised release for a term of five years.

At the trial of alleged co-conspirators Joe Guerra and Wayne Walker, the government presented evidence of the seizure of 146.77 grams (0.32 pounds) of methamphetamine and 54.5 pounds of liquid (seized at an address on McCormack Mountain Drive) which contained traces of methamphetamine and phenylacetone. These drug amounts were utilized in the Presentence Report to establish Mr. Bouvier's base offense level.

At his sentencing hearing, Mr. Bouvier and the government stipulated that greater than ninety-five percent (95%) of the liquids seized at the McCormick Mountain Drive address were solvents with the remaining percentage (less than 5%) being either methamphetamine or phenylacetone. (Appendix at C 1-2).

Calculating Mr. Bouvier's base offense level, the probation office included the entire weight of the 54.5 pounds of liquid seized in arriving at a base offense level of 34. Mr. Bouvier's adjusted offense level was 35. Based on the adjusted offense level and his Plea Agreement with the Government, this resulted in a sentencing guideline range of 210 to 216 months imprisonment.

At the sentencing hearing, it was argued on Mr. Bouvier's behalf that the 54.5 pounds of liquid was uningestible, unmarketable "waste" material which did not fit within the statutory and guideline language referring to "a mixture or substance containing a detectable amount" a of controlled substance. Omission of the 54.5 pounds of liquid "waste" would have resulted in a adjusted offense level of 26 and a sentencing guideline range of 78-97 months.

At the sentencing hearing Mr. Bouvier offered the stipulation contained in Appendix C attached hereto to challenge the guideline calculation in the Presentence Report. It was argued on Mr. Bouvier's behalf that Mr. Bouvier should not be sentenced on the drug amounts contained in the Presentence Report because they included the uningestible waste byproducts of the methamphetamine manufacturing process. At the conclusion of Mr. Bouvier's argument, the Court stated the following:

> "And its my view that the law is contrary to your position at this time on that point. I will overrule the objection."

Based on such ruling, the Court sentenced Mr. Bouvier to 210 months imprisonment based on the full amount of the toxic chemical substances found at the McCormick Mountain Drive address.

Mr. Bouvier raised the sentencing issue on appeal to the United States Court of Appeals for the Fifth Circuit. That Court had jurisdiction pursuant to 28 U.S.C. §1291. The Fifth Circuit upheld the District Court's inclusion of the weight of the 54.5 pounds of toxic solvents. Accordingly, the Fifth Circuit affirmed the District Court judgment.

ARGUMENT FOR ALLOWANCE OF THE WRIT

THE INCLUSION OF THE WEIGHT OF TOXIC SOLVENTS, WHICH WOULD POISONOUS IF INGESTED, IN THE CALCULATION OF THE DRUG AMOUNT FOR SENTENCING PURPOSES IS IRRATIONAL, UNJUST AND CONTRARY TO THE DECISION OF THIS COURT IN UNITED STATES V. CHAPMAN. THE CIRCUIT COURTS DIRECTLY CONFLICT ON THIS ISSUE. THEREFORE, THIS CASE PRESENTS AN IMPORTANT ISSUE OF FEDERAL CRIMINAL LAW WHICH HAS NOT BEEN SETTLED BY THIS COURT.

This appeal involves the interpretation of 21 U.S.C. § 841 and Federal Sentencing Guidelines § 2D1.1(c), which base the length of the sentence on the amount of methamphetamine seized or on the amount of a "mixture or substance seized which contains a detectable amount of methamphetamine, its salts, isomers or salts of its isomers." 21 U.S.C. § 841(b)(1)(A)(viii). This issue was considered by the United States Supreme Court with respect to the distribution of LSD in United States v. Chapman, _____ U.S. _____ 111 S. Ct. 1919, 114 L. Ed 2d 524 (1991). In Chapman, the Court considered whether or not the weight of the blotter paper customarily used to distribute LSD could be taken into consideration in passing sentence under the Federal Sentencing Guidelines. The court noted that:

> Congress adopted a 'market-oriented' approach to punishing drug trafficking, under which the total quantity of what is distributed, rather than the amount of pure drug involved, is used to determine the length of sentence. ... It intended the penalties for drug trafficking to be graduated according to the weight of drugs in whatever form they [are] found - cut or uncut, pure or impure, ready for wholesale or ready for distribution at the retail level.

Id. at 1925.

In upholding a sentence based on the weight of the LSD in addition to the blotter paper on which it was distributed, the Supreme Court held that the drug amount should include the weight of any carrier medium utilized to facilitate the wholesale or retail distribution of controlled substances.

The Circuit Courts have split on the question of whether unusable waste may constitute a "mixture or substance" within the meaning of the Sentencing Guidelines. This Court should review this case to clearly establish the proper application of §2D1.1 of the Sentencing Guidelines. Section 2D1.1 Drug Quantity Table, note *, provides:

> [T]he weight of the controlled substance set forth in the table refers to the entire weight of any mixture or substances containing a detectable amount of the controlled substance.

Application Note 1, from the commentary and following Section 2D1, provides:

> "Mixture or substance" is used in this Guideline has the same meaning as in 21 U.S.C. § 841.

"Mixture or substance" is not defined in 21 U.S.C. §841. This Court interpreted that language in Chapman. In reaching its decision in Chapman, this Court looked to legislative intent and concluded that "Congress clearly intended the dilutant, cutting agent, or carrier medium to be included in the weight of those drugs for sentencing purposes." Chapman at 1924.

The petitioners' argument in Chapman was that inclusion of the weight of the LSD "carrier" is arbitrary and without rational basis. This Court responded that it is a rational sentencing scheme to measure drug quantity according to the "street weight" of drugs in the diluted form in which they are sold, rather than according to the net weight of the active

component. This results in the assessment of stiffer penalties for the distribution of larger quantities of drugs. Although blotter paper is technically not a dilutant, it facilitates distribution of the drug by making "LSD easier to transport, store, conceal and sell. It is a tool of the trade for those who traffic in the drug and therefore it was rational for Congress to set penalties based on this chosen tool." Id at 1928.

The entire premise of this Court's decision in Chapman was that Congress would have intended the weight of the LSD "carrier" to be considered as a "mixture or substance" for sentencing purposes because it is distributed with the drug. Congress' "market oriented" approach dictates that sentences be assigned in accordance with marketable drug quantities. The greater the quantity involved in drug trafficking, the stiffer the penalty should be.

This logic is inapplicable to waste materials containing detectable drug amounts. The quantity of waste material bears no relation to the quantity of distributable drugs. There is no hint in the legislative history of 21 U.S.C. §841 that Congress intended penalties for drug offenses to be commensurate with the quantity of unusable liquid byproducts which were fortuitously discovered prior to disposal.

Three Circuits have relied upon Chapman to exclude waste or byproducts from total drug amount upon which a sentence was calculated. In United States vs. Rolande-Gabriel, 938 F.2d 1231 (11th Cir. 1991), the Defendant was convicted of importation of cocaine. The Defendant was arrested with plastic bags containing a liquid substance. This liquid substance included cocaine, a cutting agent for cocaine and liquid waste. The defendant was sentenced based on the total weight of all three substances.

The Defendant did not argue that the cutting medium should be excluded from the drug

amount in consideration of sentencing, but only that the liquid waste should not be considered under the "mixture or substance" language at 21 U.S.C. § 841 and the Sentencing Guidelines. The Rolande-Gabriel court reiterated the Chapman decision to the effect that the inclusion of the weight of standard carrier mediums is rational because the standard carrier medium facilitates the use and access of LSD and other drugs. "The liquid waste in this case, however, did not accomplish any of these purposes. The inclusion of the carrier medium of unusable liquid waste in this case for sentencing is irrational." Id. at 1237. Although the court found it logical to base sentences upon the gross weight of usable mixtures, it held that it was "fundamentally absurd to give an individual a more severe sentence for a mixture which is unusable and not ready for retail or wholesale distribution while a person with useable mixtures would receive far less severe sentences." Id.

In reaching its decision in Rolande-Gabriel, the Court looked at the policies behind the Sentencing Guidelines.

> The Policy Statement of the Sentencing Guidelines states that "Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders. [Congress also] sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity." [U.S.S.G., Ch. 1, Pt. A], at 1.2 (emphasis added). The Policy Statement goes on to note that the Commission deliberately avoided a system of broad discretion in sentencing ranges because to do so
>
> > would have risked correspondingly broad disparity in sentencing,.... Such an approach would have risked a return to the wide disparity that Congress established the Commission to reduce and would have been contrary to the commission's mandate set forth in the Sentencing Reform Act of 1984.
>
> Id., at 1.3 In order to bring about a coherent system of rational and uniform sentencing, the Commission chose to adopt an empirical (sic) method of sentencing. Id.

Rolande-Gabriel, 938 F.2d at 1235.

As the Court pointed out in Rolande-Gabriel, the Sentencing Commission's comment, indicating that "mixture or substance" has the same meaning as it does in 21 U.S.C. §841, conflicts with the policies of rationality and uniformity which the guidelines were adopted to serve. Strict application of the "mixture or substance' language to include the weight of unusable mixtures would result in disparate and irrational sentences.

> This hyper-technical and mechanical application of the statutory language defeats the very purpose behind the Sentencing Guidelines and crates an absurdity in their application: the disparate and irrational sentencing arising out of a "rational and uniform" scheme of sentencing.

Id. The Court concluded that the most rational course was to interpret "mixture or substance' in light of the purposes behind the Sentencing Guidelines in order to achieve "the greatest degree of uniformity and rationality in sentencing." Id.

United States v. Jennings, 945 F.2d 129 (6th Cir. 1991) is a methamphetamine case. Government agents seized a crockpot that contained approximately 4,180 grams of a substance of which 1.67 percent was methamphetamine. The Defendants' base offense levels were established based on the total weight of the substance in the crockpot. Jennings argued that the District Court erred in its interpretation of 21 U.S.C. § 841 and the application of the Federal Sentencing Guidelines in computing his base offense level by weighing the total amount of the mixture instead of the estimated amount of methamphetamine. Defendants contended that including the entire amount of the mixture was irrational for several reasons including that the mixture, in the form in which it was found, contained only a small amount of methamphetamine together with unreacted chemicals and byproducts which were poisonous if ingested.

The Jennings court held that the crockpot was a "mixture that contained a detectable amount of methamphetamine. However, interpreting the statute to require the inclusion of the

entire contents of the crockpot for sentencing ... would both produce an illogical result and be contrary to the legislative intent underlying the statute." Id. at 136. Thus, the court found it to be completely unwarranted to punish the defendants based on the weight of the mixture when they could neither have produced that amount of methamphetamine nor distributed the mixture. Since the crockpot contained only a small amount of methamphetamine mixed together with poisonous unreacted chemicals and byproducts, there was no possibility that the mixture could be distributed to consumers. It would, therefore be inappropriate to include the entire weight of the mixture for sentencing purposes. The case was remanded to the district court for further proceedings on sentencing.

The court in United States v. Acosta, 963 F.2d 551 (2nd Cir. 1992), considered whether the weight of a creme liqueur which was mixed with cocaine should be included in determining the defendant's base offense level. Relying on Chapman, the Acosta Court emphasized that Congress had made clear that those who distribute more of a drug by increasing the amount of diluents are more culpable because they are responsible for more of the substance reaching the streets. "Purity is not the focal point of culpability; rather Congress was concerned with the amount of consumable drugs on the market whether pure or impure." Id. at ___.

The court therefore held that "even though the cocaine/creme liqueur may fall within the dictionary definition of 'mixture', the legislative history convinces us that the weight of the creme liqueur must be excluded. Function, not formula is critical. Congress was concerned with mixtures that will eventually reach the streets, i.e. consumable mixtures." Id. at ___.

The court concluded that the creme liqueur was improperly included in the calculation for sentencing as the liqueur's weight is not important "but, rather, how much of the commodity

[i.e., drugs and cutting agents] one transports or distributes that is relevant in calculating the weight of a controlled substance for sentencing purposes." Id. at p. ____. Thus, culpability is determined by "the amount of usable drugs that [the defendant] brings to the market." Id. at p. ____

In U.S. v. Touby, 909 F.2d 759, 773 (3rd Cir.), aff'd on other grounds, 111 S.Ct. 1752 (1991), the court recognized that validity of a sentencing distinction between a consumable and marketable drug in which a cutting or distributing agent, or a carrier medium is found in combination with the drug itself, and a case where what is found is merely inconsumable waste material, bound for the garbage can rather than for the market. The Defendant argued in that case that 97% of the 100 gram "slab" containing the designer drug Euphoria contained poisonous ingredients which rendered the substance inconsumable. Although the Third Circuit implied that the rationale of defendant's position was persuasive, the Court found insufficient facts to support the argument, noting that

> There was no attempt to prove at trial or at the sentencing hearing that these ingredients were manufacturing by-products rather than a "cut" . . . There is no basis in this record to deviate from the general rule that the total weight of the drug should be used for determining the criminal offense level. .

Id. at 773.

In U.S. v. Beltran-Felix, 934 F.2d 1075 (9th Cir.), cert. denied, _____ U.S. ____ (1992), the court reached a conclusion diametrically opposite to that of the Jennings court on similar facts. The defendant in Beltran-Felix was "cooking" methamphetamine at the time of his arrest. He argued that the weight of the entire methamphetamine solution should not be considered for sentencing purposes because it was not in a distributable state. The Court declared that it could find no legislative history requiring that "mixture or substance" be

interpreted to mean "a [readily marketable] mixture or substance." Id. at 1076. Finding no statutory exemption to the by-products of methamphetamine manufacture, the court held that it made no difference that the methamphetamine had not yet been processed into its final form. Accordingly, the Court upheld the inclusion of the entire weight of the methamphetamine mixture.

In United States v. Mahecha-Onefre, 936 F.2d 623 (1st Cir. 1991), the court rejected the defendant's argument for excluding the weight of a suitcase that cocaine had chemically bonded with. The court noted that the two substances must be separated before use and that the suitcase was uningestible. However, the court held that the inclusion of the weight of the suitcase, minus metal parts, was proper. Id. at 625.

The Fifth Circuit has squarely held that waste materials are to be included in determining the base offense level. In United States v. Baker, 883 F.2d 13 (5th Cir.), cert. denied, 493 U.S. 983 (1989), the Court determine that the entire weight of a liquid methamphetamine mixture was properly used to calculate the base offense level, despite recognition of the fact that most of the liquid was waste material. The Fifth Circuit affirmed the Baker holding in United States v. Mueller, 902 F.2d 336 (5th Cir. 1990), which raised the same issue concerning the inclusion of the weight of 8.5 gallons of methamphetamine mixture in sentencing calculations. See also, United States v. Butler, 895 F. 2d 1016 (5th Cir.), cert. denied, 111 S.Ct. 82 (1990).

In U.S. v. Dorrough, 927 F.2d 498 (10th Cir. 1991), the Tenth Circuit upheld the District court's inclusion of the entire weight of 94 liters of a mixture containing P2P. The Court rejected the defendant's argument in that case that the appropriate weight is the maximum amount of drugs that could be produced from the manufacturing process. In contrast to the case

before the court, the 94 liters involved in Dorrough was seized before the manufacturing process had been completed.

In this case, there is no rational relationship between the amount of liquid waste and the quantity of marketable drugs which were, or could have been, produced. The recovery of the liquid mixture in this case was a purely adventitious factor. Inclusion of the weight of the 54.5 gallons of waste to determine the base offense level in this case flies in the face of the sentencing guideline purposes of uniform and rational sentencing.

The statutory and guideline "mixture or substance" language does not encompass waste material which might contain detectable amounts of controlled substance. The holding that waste material is to be treated the same as a cutting agent mixed with a drug works a gross injustice to Mr. Bouvier. Such an interpretation of the Anti-Drug Abuse Act produces a result which this Court termed in Chapman as "so 'absurd or glaringly unjust'" as to raise a "reasonable doubt" concerning congressional intent. Id., at 1927 (quoting United States v. Rodgers, 466 U.S. 475 (1984) and Moskal v. United States, 498 U.S. 1026, (1990).

The Fifth Circuit's reading of the "mixture or substance" language has produced an arbitrary result that contravenes the due process of law guaranteed by the Fifth Amendment. see, Chapman, 111 S.Ct. at 1927. In Bolling v. Sharpe, 347 U.S. 497 (1954), this Court held that the due process clause of the Fifth Amendment, which contains no equal protection clause, is violated by federal government action which would violate the equal protection clause of the Fourteenth Amendment if it were state action.

Four circuits have decided this issue contrary to the holding in the Fifth Circuit (Second, Third, Sixth and Eleventh Circuits). The Tenth circuit has agreed with the position of the Fifth

Circuit in United States v. Dorrough and United States v. Fowner, No. 90-2215 (10 Cir. October 30, 1991). The First Circuit in (Machecha-Onefre) and Ninth Circuit in (Beltran-Felix) have suggested that they would follow the position of the Fifth Circuit.

This Court should accept certiorari in this case in order to resolve the grave constitutional issue presented, to settle the conflict between the circuit courts which is epitomized by this case, and to establish the proper application of this Court's holding in Chapman.

CONCLUSION

The petition should be granted in this case to correct the Fifth Circuit's misinterpretation of the Federal Sentencing Guidelines and to settle the discrepancies among the Circuit Courts concerning sentencing for controlled substance offenses. Federal law should be evenly and consistently applied throughout the Circuits. Without a resolution by this Court, the same federal law will be used to promote gross disparities in the sentencing of these crimes depending on the geographical location of the offense. Such arbitrary results should not be tolerated when a unifying solution can be so easily provided by this Court.

For all the reasons stated above, petitioner Robert Bouvier requests that this Court grant his petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

A. FIFTH CIRCUIT OPINION

B. DISTRICT COURT OPINION

C. STIPULATION OF THE PARTIES

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
APR 24 1992
GILBERT F. GAUDET
CLERK

No. 91-8423

D.C. Docket No. A-90-CR-30 (1)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROBERT BOUVIER,

Defendant-Appellant.

FILED
MAY 26 1992
CLERK U.S. DISTRICT COURT
BY Deputy

Appeal from the United States District Court for the Western District of Texas

Before GARWOOD and DeMOSS, Circuit Judges, and DUPLANTIER[1], District Judge.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

April 24, 1992

ISSUED AS MANDATE: MAY 18 1992

A true copy
Test

Clerk, U. S. Court of Appeals, Fifth Circuit

By Nancy F. Dolly
Deputy

New Orleans, Louisiana MAY 18 1992

[1]District Judge of the Eastern District of Louisiana, sitting by designation.

UNITED STATES of America, Plaintiff-Appellee,

v.

Wayne Eugene WALKER and Joe Guerra, Defendants-Appellants.

UNITED STATES of America, Plaintiff-Appellee,

v.

Robert BOUVIER, Defendant-Appellant.

Nos. 91-8396, 91-8423.

United States Court of Appeals, Fifth Circuit.

April 24, 1992.

Defendants either pled guilty or were convicted by jury in the United States District Court for the Western District of Texas at Austin, James R. Nowlin, J., of conspiracy to possess with intent to distribute more than 100 grams of methamphetamine and possession with intent to distribute methamphetamine. On consolidated appeals, the Court of Appeals, Duplantier, District Judge, sitting by designation, held that: (1) district court correctly used total weight of liquid substance containing small percentage of methamphetamine in calculating base offense level, despite fact that most of liquid was waste material; (2) delays resulting from district court's sua sponte continuances of hearing on pretrial motions and grant of government's motion for continuance were not excludable from calculation of time under Speedy Trial Act; (3) methamphetamine was still properly classified as schedule II controlled substance, and sufficient evidence existed that subject methamphetamine was not descheduled substance; and (4) defendant's warrantless arrest was based upon probable cause and thus did not violate Fourth Amendment.

Affirmed.

1. Drugs and Narcotics ⇐133

In calculating quantity of methamphetamine seized in determining defendants' base offense levels under Sentencing Guidelines, district court correctly used total weight of liquid substance containing methamphetamine found in laboratory, despite fact that most of liquid was waste material. U.S.S.G. § 2D1.1, Table n.*, 18 U.S.C.A.App.

2. Criminal Law ⇐577.8

Delays resulting from district court's sua sponte continuations of hearing on pretrial motions, and from grant of government's motion to continue that hearing based upon death in family and hospitalization of wife of assistant United States Attorney handling case, would be excluded from computation of time under Speedy Trial Act, even though delays were not requested or caused by defendants. 18 U.S.C.A. § 3161(c)(1), (h)(1)(F).

3. Criminal Law ⇐577.8

Delays resulting from pretrial motions will toll trial clock indefinitely; there is no independent requirement that delay attributable to motions be reasonable. 18 U.S.C.A. § 3161(h)(1)(F).

4. Drugs and Narcotics ⇐46

Methamphetamine is still properly classified as schedule II controlled substance, notwithstanding Drug Enforcement Admin-

Synopsis, Syllabi and Key Number Classification
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istration (DEA) descheduling of products containing diluted isomers of methamphetamine.

5. Conspiracy ⇐47(12)

Drugs and Narcotics ⇐123(2)

In trial for conspiracy to possess with intent to distribute more than 100 grams of methamphetamine and possession with intent to distribute methamphetamine there was sufficient evidence that methamphetamine introduced by government was not one of the descheduled substances containing diluted isomers of methamphetamine.

6. Criminal Law ⇐394.2(2)

Question that federal court must ask when evidence secured by state officials is to be used as evidence against defendant accused of federal offense is whether actions of state officials in securing evidence violated Fourth Amendment to United States Constitution, not whether state officials' actions in arresting defendant were lawful or valid under state law. U.S.C.A. Const.Amend. 4.

7. Arrest ⇐63.4(2, 11)

Fourth Amendment dictates that warrantless arrest be based upon "probable cause," which exists when facts and circumstances within knowledge of arresting officer are sufficient to cause person of reasonable caution to believe that offense has been or is being committed; arresting officer does not have to have personal knowledge of all facts constituting probable cause, which can rest upon collective knowledge of police when there is communication between them. U.S.C.A. Const. Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

8. Arrest ⇐63.4(10)

Police had probable cause to arrest defendant, based on police officer's discovery from confidential informant that defendant was in possession of precursor chemicals used to manufacture methamphetamine, as well as other information provided by confidential informant and cooperating individual. U.S.C.A. Const. Amend. 4.

9. Criminal Law ⇐1158(4)

Court of Appeals accepts trial court's credibility choices and factual findings based upon live testimony at suppression hearing unless findings are clearly erroneous or influenced by incorrect view of the law.

10. Criminal Law ⇐1250

In calculating narcotics conspiracy defendant's base offense level under Sentencing Guidelines, district court did not clearly err in concluding that defendant was average participant in conspiracy, that he had not accepted responsibility, and that he had obstructed justice, even though initial presentence report characterized defendant as "minor participant" in conspiracy and deducted two points for acceptance of responsibility. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.App.

Appeals from the United States District Court for the Western District of Texas.

Before GARWOOD and DEMOSS, Circuit Judges, and DUPLANTIER,* District Judge.

* District Judge of the Eastern District of Louisiana, sitting by designation.

DUPLANTIER, District Judge:

Investigations by the Austin, Texas, Police Department resulted in the discovery of a clandestine methamphetamine laboratory and the arrests of defendants, Robert Bouvier, Joe Guerra, and Wayne Walker, along with others.[1] Defendants were charged in a two-count indictment: count one charged a conspiracy to possess with intent to distribute more than 100 grams of methamphetamine; count two charged possession with intent to distribute methamphetamine. After defendant Bouvier successfully moved to sever his trial, defendants Walker and Guerra were convicted by a jury on both counts of the indictment. Bouvier subsequently entered into a plea agreement with the government, reserving his right to appeal the district court's denial of his pre-trial motions, and pleaded guilty to count one of the indictment.

In these consolidated appeals, all defendants contend that the district court improperly calculated the quantity of methamphetamine seized in determining their base offense levels under the Sentencing Guidelines. They also contend that the district court erred in denying their motions to dismiss based upon violations of the Speedy Trial Act, 18 U.S.C. § 3161, and based upon failure of the indictments to state an offense on the theory that methamphetamine has been "descheduled" as an unlawful drug. As noted hereafter, all three of these contentions are foreclosed by precedent in this circuit. In addition, defendant Walker presents a sufficiency of the evidence claim, and defendant Guerra contends that the district court erred in denying his motion to suppress his confession and other evidence and in calculating his offense level for sentencing. Finding that the district court committed no error, we affirm.

WEIGHT OF METHAMPHETAMINE IN COMPUTING GUIDELINES

[1] In executing a search warrant at a residence where they found the methamphetamine laboratory, police seized a quantity of a toxic liquid substance consisting of phenylacetone and a small percentage of methamphetamine. At trial, a chemist testified that the liquid was probably a waste product left over from the methamphetamine manufacturing process. At Bouvier's sentencing hearing, the government stipulated that "over ninety-five per cent of the volume or weight of those liquids" was solvents. Defendants contend that the district court erred in its application of the sentencing guidelines when it used the total weight of the liquid in calculating their offense levels.

This court has consistently rejected arguments similar to defendants'[2] *See United States v. Mueller*, 902 F.2d 336 (5th Cir. 1990); *United States v. Butler*, 895 F.2d 1016 (5th Cir.1989), *cert. denied*, — U.S. —, 111 S.Ct. 82, 112 L.Ed.2d 54 (1990); *United States v. Baker*, 883 F.2d 13 (5th Cir.), *cert. denied*, 493 U.S. 983, 110 S.Ct. 517, 107 L.Ed.2d 518 (1989). In *Baker*, the court held that the district court correctly used the total weight of a liquid substance containing methamphetamine in calculating

1. Defendants were indicted along with Michael Kelly and Lisa Prinz, who are not appellants in this proceeding.
2. In the Fifth Circuit, "one 'panel may not overrule the decision, right or wrong, of a prior panel,' ... in the absence of en banc reconsideration or superseding decision of the Supreme Court." *Pruitt v. Levi Strauss & Co.*, 932 F.2d 458, 465 (5th Cir.1991) (citations omitted).

Chapman

defendant's base offense level, despite that fact that most of the liquid was waste material. *Baker*, 883 F.2d at 14-15.[3]

In *Butler*, the court found that defendant's offense level had been properly calculated based upon thirty-eight and one-half pounds of a liquid consisting of seven to fourteen grams of methamphetamine and the remainder "lye water." *Butler*, 895 F.2d at 1018. The court found that the defendant's argument was foreclosed by the specific language[4] of the guidelines and by the holding in *Baker*. Finally, in *Mueller*, the court rejected defendant's argument that his offense level had been calculated improperly based upon 8.5 gallons of methamphetamine, because the mixture seized consisted largely of acetone rather than methamphetamine. *Mueller*, 902 F.2d at 345. Again, the court confirmed that *Baker* foreclosed such an argument. *Id.*

Defendants assert that the Supreme Court's recent decision in *Chapman v. United States*, — U.S. —, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991), effectively overruled *Baker* and its progeny. We disagree. In *Chapman*, the Court held that the weight of the blotter paper used to distribute LSD and not simply the weight of the pure LSD should be used for sentencing, because the blotter paper is a mixture or substance containing a detectable amount of LSD. *Id.* 111 S.Ct. at 1922. The Court found that the words "mixture" and "substance" in 21 U.S.C. § 841(b)(1)(B)(v) and the sentencing guidelines, given their ordinary meaning, would include the blotter paper. *Id.* at 1925–26. It also found that such a sentencing scheme was rational because, although blotter paper is not used to "dilute" LSD, it facilitates the distribution of the drug and makes LSD easier to "transport, store, conceal, and sell." *Id.* at 1928. *Chapman* did not involve methamphetamine; nor did it involve a liquid. Hence, the Court did not speak to the issue of whether the weight of liquid waste containing methamphetamine should serve as a basis for computing a defendant's offense level. Thus, *Chapman* did not overrule *Baker*. To the contrary, much of the language in *Chapman* supports this court's decision in *Baker*.[5]

In sentencing defendants, the district court correctly used the entire weight of a mixture or substance containing a detectable amount of methamphetamine.

3. We note that for sentencing purposes Congress has provided that 100 grams of "methamphetamine" is equivalent to a kilogram of "a mixture or substance containing a detectable amount of methamphetamine," 21 U.S.C. § 841(b)(1)(A)(viii), and 10 grams of "methamphetamine" is equivalent to 100 grams of "a mixture or substance containing a detectable amount of methamphetamine." 21 U.S.C. § 841(b)(1)(B)(viii).

4. The guidelines provide: "Unless otherwise specified, the weight of a controlled substance ... refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance." Note following Drug Quantity Table, United States Sentencing Guidelines § 2D1.1.

5. The Sixth and Eleventh Circuits have held that liquid waste should not be included in determining the relevant amount of drugs for sentencing purposes. *United States v. Jennings*, 945 F.2d 129 (6th Cir.1991); *United States v. Rolande-Gabriel*, 938 F.2d 1231, (11th Cir.1991). Contrary to defendants' arguments, those courts did not find that *Chapman* required such a conclusion. In fact, they distinguished *Chapman* in reaching their conclusions. *Jennings*, 945 F.2d at 136; *Rolande-Gabriel*, 938 F.2d at 1235–36. In addition, the issue of whether liquid waste should be used in weighing drugs seemed to be one of first impression in both circuits. Thus, those courts were not bound by previous decisions in their own circuits, as we are.

SPEEDY TRIAL ACT

[2] All defendants contend that the district court erred in denying their motions to dismiss based upon violations of the Speedy Trial Act, 18 U.S.C. § 3161. The Act requires that "the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date of the information or indictment...." 18 U.S.C. § 3161(c)(1). The Act also provides for the exclusion of "[a]ny period of delay resulting from other proceedings concerning the defendant, including ... delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion...." 18 U.S.C. § 3161(h)(1)(F).

Defendants were indicted on March 6, 1990. On March 26 they filed a variety of pre-trial motions, which were set for hearing. Before the motions were heard, defendants entered into plea agreements with the government and entered pleas of guilty. In October, the district court rejected defendants' guilty pleas and reset the pre-trial motions for hearing on January 4, 1991. Defendants filed additional pre-trial motions before January 4. Defendants concede that, aside from the twenty days between the filing of the indictments and the first pre-trial motions, all time up until January 8 should be excluded under the Act. The excludability of the delays after January 8 is at issue.

On January 8, the district court *sua sponte* continued the hearing on the pre-trial motions until February 19. On February 13, the court continued the hearing *sua sponte* until April 15. On April 18, the court granted the government's motion to continue the hearing based upon a death in the family and hospitalization of the wife of the Assistant United States Attorney handling the case. On April 19, May 6, and May 9, Walker, Bouvier, and Guerra, respectively, filed their motions to dismiss based on violations of the Speedy Trial Act, which the district court denied orally after a hearing on all of the pre-trial motions, on May 20–21. The court filed a written order regarding the rulings a few days later.[6]

Defendants contend that because the delays after January 8 were not requested or caused by them, those delays should not be excluded from computation of time under the Act. An identical argument was rejected in *United States v. Horton*, 705 F.2d 1414, 1416 (5th Cir.), *cert. denied*, 464 U.S. 997, 104 S.Ct. 496, 78 L.Ed.2d 689 (1983). There, defendants attacked the exclusion of the period of time during which motions were pending as unjustified, "asserting that little or none of it was occasioned at their request or on their account." *Id.* "Even assuming this to be so," the court concluded that defendants' argument must fail because the Act is "all but absolute" in excluding time during which motions are pending. *Id.* An exception might be justified in a particularly egregious case, for example, when defendants have presented "repeated unsuccessful requests for hearings or ... other credible indication that a hearing had been deliberately refused with intent to evade the sanctions of the Act." *Id.* Like the defendants in *Horton*, defendants have not presented such a case here. Defendants conceded at oral argument that during the pendency of their motions they neither complained of the delay nor did

6. Trial of Walker and Guerra commenced on June 3, 1991. Bouvier entered his plea of guilty to count one of the indictment on June 24, 1991.

anything to expedite a decision on their motions.

Defendants Walker and Guerra also complain that the district court erred by not following the requirements of section (h)(8)(A) of the Act, which excludes

> [a]ny period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.

18 U.S.C. § 3161(h)(8)(A). The district court's orders continuing the hearings *sua sponte* did not contain such a finding, although the court made such a finding with regard to all continuances in its written order denying defendants' pre-trial motions.

[3] It is not necessary to determine whether the delays at issue should be excluded under section 8(A), because the delays are specifically excluded by section 1(F) as delays resulting from pre-trial motions. Delays resulting from pre-trial motions " 'will toll the trial clock indefinitely; there is no independent requirement that the delay attributable to the motions be reasonable.' " *United States v. Santoyo*, 890 F.2d 726, 728 (5th Cir.1989), *cert. denied*, 495 U.S. 959, 110 S.Ct. 2567, 109 L.Ed.2d 749 (1990) (quoting *United States v. Kington*, 875 F.2d 1091, 1109 (5th Cir. 1989) (citations omitted)).

METHAMPHETAMINE NOT DESCHEDULED

[4] Defendants also contend that the district court erred in denying their motions to dismiss the indictments for failure to charge an offense: they argue that the Drug Enforcement Administration descheduled methamphetamine and failed to follow the proper procedure for rescheduling it. Thus, they reason, methamphetamine is not a controlled substance.

Defendants argue that methamphetamine was descheduled in 1976 when the DEA descheduled Rynal Spray and Vicks Inhaler, products containing diluted isomers of methamphetamine. Defendants' argument is precluded by the Fifth Circuit's recent opinion in *United States v. Martinez*, 950 F.2d 222 (5th Cir.1991). There, the court concluded that, although the DEA descheduled Rynal and Vicks Inhaler, the DEA did not deschedule all forms of methamphetamine, and thus, "methamphetamine is still properly classified as a schedule II controlled substance." *Id.* at 224.[7]

WALKER'S SUFFICIENCY OF THE EVIDENCE CLAIM

[5] Defendant Walker contends that even if methamphetamine is properly scheduled as a controlled substance, the evidence at trial was insufficient to show that the methamphetamine introduced by the government was not one of the substances descheduled by 21 C.F.R. § 1308.22. *Martinez* makes clear that the substances descheduled by section 1308.22 were Rynal Spray and Vicks Inhaler, which

7. In so concluding, the Fifth Circuit agreed with decisions of the Eighth and Ninth Circuits. *See United States v. Durham*, 941 F.2d 886, 889–90 (9th Cir.1991); *United States v. Roark*, 924 F.2d 1426, 1428 (8th Cir.1991).

contain specific quantities of controlled substances. The chart contained in section 1308.22 lists excluded nonnarcotic products and designates for each product a company name, trade name, controlled substance contained therein, and specific quantity of the controlled substance. The controlled substances listed in the chart were not descheduled altogether; they were descheduled only in the form of Rynal Spray and Vicks Inhaler.[8]

Thus, the jury's verdict must be affirmed if any rational trier of fact could have found beyond a reasonable doubt that the substance seized was methamphetamine, but not Rynal Spray or Vicks Inhaler. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); *United States v. Carrasco*, 830 F.2d 41, 43 (5th Cir.1987). Considering the evidence in the light most favorable to the government, and accepting all reasonable inferences that tend to support the jury's verdict, we affirm the verdict. *Carrasco*, 830 F.2d at 43–44; *United States v. Marx*, 635 F.2d 436 (5th Cir.1981). Chemist Ralph Owen testified that the methamphetamine at issue was not Vicks Inhaler or Rynal Spray. Likewise, Chemist Anthony Arnold testified that the methamphetamine was not in the form of Rynal Spray or Vicks Inhaler. Given this testimony, a rational trier of fact could have found beyond a reasonable doubt that the methamphetamine introduced by the government was an illegal controlled substance.

GUERRA'S MOTION TO SUPPRESS

Defendant Guerra contends that the district court erred in denying his motion to suppress the physical evidence obtained as a result of his warrantless arrest, as well as the confessions that he made following the arrest. Guerra contends that the physical evidence and confession were fruits of an arrest that was unlawful under Texas law and, as such, should be suppressed. The government contends that federal law controls, and that probable cause existed for Guerra's arrest, making it valid under federal law. Alternatively, the government asserts that Guerra's arrest was valid also under Texas law.

[6] Defendant Guerra's argument to the contrary, the proper inquiry in determining whether to exclude the evidence at issue is not whether the state officials' actions in arresting him were "lawful" or "valid under state law." The question that a federal court must ask when evidence secured by state officials is to be used as evidence against a defendant accused of a federal offense is whether the actions of the state officials in securing the evidence violated the Fourth Amendment to the United States Constitution. This is so because, absent an exception, the exclusionary rule requires that evidence obtained in violation of the Fourth Amendment be suppressed. The exclusionary rule was created to discourage violations of the Fourth Amendment, not violations of state law. *See Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961); *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914).

In *United States v. Garcia*, 676 F.2d 1086 (5th Cir.1982), this court excluded evidence that it found to have been obtained pursuant to arrests by state officers be-

8. The current version of section 1308.22 no longer lists Rynal Spray as an excluded product. *See* 21 C.F.R. § 1308.22 (1991).

cause the court determined that the arrests were illegal under Texas law. The Supreme Court vacated *Garcia* and remanded to the panel for reconsideration in light of *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982). *See Garcia*, 676 F.2d 1086 (5th Cir.1982), *vacated and remanded*, 462 U.S. 1127, 103 S.Ct. 3105, 77 L.Ed.2d 1360 (1983). *Ross* discusses the Fourth Amendment standards governing a warrantless search of a container in an automobile. "By remanding *Garcia* for reconsideration in light of the fourth amendment standards announced in *Ross*, the Court perforce instructed that state law did not control the case and that the admissibility of evidence depends on the legality of the search and seizure under federal law." *United States v. Mahoney*, 712 F.2d 956, 959 (5th Cir.1983), *cert. denied*, 468 U.S. 1220, 104 S.Ct. 3590, 82 L.Ed.2d 887 (1984). *See also United States v. Mitchell*, 783 F.2d 971, 973 (10th Cir.), *cert. denied*, 479 U.S. 860, 107 S.Ct. 208, 93 L.Ed.2d 138 (1986).

Whether the Fourth Amendment has been violated is determined solely by looking to federal law on the subject. *See California v. Greenwood*, 486 U.S. 35, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988). There, the Supreme Court rejected a claim that the Fourth Amendment required suppression of evidence resulting from a warrantless search and seizure that was illegal under California law.

> Individual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution. We have never intimated, however, that whether or not a search is reasonable within the meaning of the Fourth Amendment depends on the law of the particular State in which the search occurs.

Id. 108 S.Ct. at 1630. The Fifth Circuit has recognized that

> [b]ecause it is a creature of the federal courts and because it ought to be applied in a manner that promotes uniformity in federal cases, federal law must guide our decision whether to apply the exclusionary rule whether or not the legality of the underlying arrest or search turns on state law.

Mahoney, 712 F.2d at 959.

We are aware that in *United States v. Di Re*, 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210 (1947), the Supreme Court reversed a federal conviction because it was based upon evidence obtained from an arrest that was illegal under state law. We agree with the Tenth Circuit's conclusion that *Di Re* "was rejected, by implication," in *Elkins v. United States*, 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960): " 'The test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed.' " *United States v. Miller*, 452 F.2d 731, 733 (10th Cir.1971), *cert. denied*, 407 U.S. 926, 92 S.Ct. 2466, 32 L.Ed.2d 813 (1972) (quoting *Elkins*, 364 U.S. at 224, 80 S.Ct. at 1447). *See Mahoney*, 712 F.2d at 959, n. 3. A commentator has suggested that "*Di Re* is simply an instance of the Court utilizing its supervisory power to exclude from a federal prosecution evidence obtained pursuant to an illegal but constitutional federal arrest" by a local police officer. LaFave, *Search and Seizure*, § 1.5(b) at 107. If that is so, *United States v. Payner*, 447 U.S. 727, 100 S.Ct. 2439, 65 L.Ed.2d 468 (1980), makes clear that the Court is no longer interested in using its supervisory power to exclude

evidence obtained unlawfully but under circumstances not violative of the Fourth Amendment. A federal court should not "use its supervisory power to suppress evidence tainted by gross illegalities that did not infringe the defendant's constitutional rights." *Id.* at 733, 100 S.Ct. at 2445.

[7] The Fourth Amendment dictates that a warrantless arrest be based upon probable cause. *United States v. De Los Santos*, 810 F.2d 1326, 1336 (5th Cir.), *cert. denied*, 484 U.S. 978, 108 S.Ct. 490, 98 L.Ed.2d 488 (1987). Thus, in determining whether to suppress the evidence at issue, the inquiry is whether the officers had probable cause to arrest Guerra. "Probable cause 'exists when the facts and circumstances within the knowledge of the arresting officer are sufficient to cause a person of reasonable caution to believe that an offense has been or is being committed.' " *Id.* (quoting *United States v. Antone*, 753 F.2d 1301, 1304 (5th Cir.), *cert. denied*, 474 U.S. 818, 106 S.Ct. 64, 88 L.Ed.2d 52 (1985)). "The arresting officer does not have to have personal knowledge of all the facts constituting probable cause; it can rest upon the collective knowledge of the police when there is communication between them." *Id.* (citing *United States v. Webster*, 750 F.2d 307, 323 (5th Cir.1984), *cert. denied*, 471 U.S. 1106, 105 S.Ct. 2340, 85 L.Ed.2d 855 (1985)).

[8] It is clear that probable cause existed for the officers to arrest Guerra and that the district court did not err in denying Guerra's motion to suppress. Before Guerra's arrest, Austin Police Department Officer Randall Milstead learned from a confidential informant that Guerra was in possession of precursor chemicals used to manufacture methamphetamine. In connection with the local law enforcement officials, Gray Hildreth, a special agent with the DEA, also investigated allegations that Guerra was selling methamphetamine. A confidential informant told Agent Hildreth that Guerra and defendant Bouvier were associates and that they had taken the informant to a residence where chemicals were stored for the manufacture of methamphetamine.

Jean Messina, who later became a cooperating individual, told an undercover officer that she could provide him with methamphetamine and took the officer to the Silvermine Hotel. While the officer stayed in the car, Messina went into a hotel room and returned approximately one half hour later with methamphetamine. Messina was arrested. When interviewed, she agreed to cooperate with the officers. She told them that she had received the methamphetamine from Guerra, who was inside the Silvermine Hotel with Ladawn Page. In a telephone call to the hotel room, Messina arranged delivery of additional methamphetamine. The phone call was recorded by the officers with Messina's consent. When Guerra and Page left the hotel, officers arrested them.[9] The facts known to the officers before they arrested Guerra clearly were sufficient to cause a person of reasonable caution to believe that an offense had been or was being committed.

[9] Guerra also contends that the district court erred in refusing to suppress his confession on the ground that it was not voluntarily given. After conducting a

9. Guerra was in possession of methamphetamine and precursor chemicals used to manufacture methamphetamine. After having been brought to the Austin Police Department and read his rights, Guerra made incriminating oral and written statements.

hearing at which Ladawn Page and several police officers testified, the district court determined that Guerra's confession was voluntary. We accept a trial court's credibility choices and factual findings based upon live testimony at a suppression hearing unless the findings are clearly erroneous or influenced by an incorrect view of the law. *United States v. Rogers*, 906 F.2d 189, 190 (5th Cir.1990). The district court credited the testimony of the officers present during Guerra's confession to the effect that Guerra desired to cooperate and that he voluntarily made oral statements and signed the written statement. The court's credibility choices and factual findings are not clearly erroneous.

CALCULATION OF GUERRA'S BASE OFFENSE LEVEL

[10] Finally, defendant Guerra contends that his base offense level was calculated in such a way as to violate due process and penalize him for having exercised his right to a trial. He comes to this conclusion by comparing the presentence report prepared at the time of the plea agreement that was rejected by the district court with the presentence report prepared after trial. He complains specifically of three changes. First, while the initial report characterized Guerra as a "minor participant" in the conspiracy, the post-trial report characterized him as an "average participant," increasing his offense level by two points. Second, the initial report deducted two points for acceptance of responsibility, and that deduction was not allowed after trial. Finally, the post-trial report added two points for obstruction of justice, based upon a letter written by Guerra to his girlfriend, Ladawn Page, who was to be a witness at his trial.

"The district court's sentence will be upheld so long as it results from a correct application of the guidelines to factual findings that are not clearly erroneous." *United States v. Rivera*, 898 F.2d 442, 445 (5th Cir.1990) (citing *United States v. Buenrostro*, 868 F.2d 135, 136-37 (5th Cir.1989)). Guerra's argument is frivolous. He cites no authority for his position; nor does he point to any evidence to show that the district court was clearly erroneous in concluding that Guerra was an average participant, that he had not accepted responsibility, or that he had obstructed justice. To the contrary, each of the changes appears to have been proper, because they reflected testimony and evidence adduced at trial. The trial judge was intimately familiar with the facts of this case; the findings that he made in calculating Guerra's base offense level are not clearly erroneous.

CONCLUSION

Finding no error, we AFFIRM the convictions and sentences of all defendants.

A true copy
Test

Clerk, U. S. Court of Appeals, Fifth Circuit

By [redacted]
Deputy

MAY 18 1992

New Orleans, Louisiana

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

UNITED STATES DISTRICT COURT
Western District of Texas

FILED
JUL 19 1991
U. S. DISTRICT COURT
CLERK'S OFFICE

UNITED STATES OF AMERICA

v.

Case Number: A-90-R-30(1)
USAO Number: 90-01068

ROBERT BOUVIER
Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, **ROBERT BOUVIER**, was represented by David Wright and Dain Whitworth.

On motion of the United States the court has dismissed count(s) 2 of the indictment.

The defendant pled guilty to count(s) 1 of the indictment at rearraignment on June 24, 1991. Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

Title & Section	Nature of Offense	Date of Offense	Count Number(s)
CONTRARY TO 21:841(a)(1), ALL IN VIOLATION OF 21:846	CONSPIFACY TO POSSESS WITH INTENT TO DISTRIBUTE METHAMPHETAMINE	02/20/90	1

As pronounced on JULY **18, 1991**, the defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of **$50.00**, for count(s) 1 of the indictment, which shall be due immediately. Said special assessment shall be made to the Clerk, United States District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 18th day of July, 1991.

JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

Defendant's SSN: 457-96-3763
Defendant's Date of Birth: 02/09/54
Defendant's address: c/o HAYS COUNTY JAIL, 1307 Old Uhland Road, San Marcos, TX 78666

Defendant: ROBERT BOUVIER
Case Number: A-90-CR-30(1)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **TWO HUNDRED AND TEN (210) MONTHS.**

The Court makes the following recommendations to the Bureau of Prisons: that the defendant be incarcerated at a federal correctional institution where he may receive the maximum amount of treatment and counselling for substance abuse. Further, that the Bureau of Prisons consider locating defendant in close proximity to his family.

The defendant is continued in custody pending service of sentence.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

Defendant: ROBERT BOUVIER
Case Number: A-90-CR-30(1)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **FIVE (5) YEARS.**

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

_x_ If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

_x_ If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remain unpaid at the commencement of the term of supervised release.

_x_ The defendant shall neither own nor possess a firearm or destructive device.

_x_ The defendant shall participate in testing and treatment for drug and alcohol abuse under the direction and supervision of the United States Probation Office.

_x_ The defendant shall pay the fine, upon his release from confinement, in consecutive monthly installments under the direction and supervision of the United States Probation Office, in an amount to be determined by the United States Probation Office.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
4) The defendant shall support his or her dependents and meet other family responsibilities.
5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.
7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any parsphernalia related to such substances.
8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Defendant: ROBERT BOUVIER
Case Number: A-90-R-30(1)

FINE

The defendant shall pay a fine of **$20,000**. This fine includes any costs of incarceration and supervision.

The Court has determined that the defendant does not have the ability to pay interest, and it is accordingly ordered that the interest requirement is waived.

This fine shall be paid to the Clerk, United States District Court, at the direction of the United States Probation Office.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

Defendant: ROBERT BOUVIER
Case Number: A-90-R-30(1)

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

Guideline Range Determined by the Court:

Total Offense Level:	35
Criminal History Category:	3
Imprisonment Range:	210 months to 262 months
Supervised Release Range:	– to 5 years
Fine Range:	$ 20,000 to $ 4,000,000
Restitution:	$ N/A

The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s): Sufficient to fulfill purposes of sentencing, protection of community and deterrence.

A true copy of the original, I certify
Clerk, U. S. District Court
By Lori Cherhue Deputy

before this court on June 24th, 1991, and your plea of guilty was accepted by the court at that time, and you're now before the court for sentencing.

Mr. Bouvier, have you had an opportunity to review the presentence investigation report in your case?

MR. BOUVIER: Yes, sir, I have.

THE COURT: Do you have anything that you want to say about that presentence investigation report?

MR. BOUVIER: I would like to defer that to my attorney.

THE COURT: Mr. Wright, have you had an opportunity to review that report?

MR. WRIGHT: Yes, sir I, have.

THE COURT: Do you have any comments, corrections or objections that have not been resolved to material matters related to this report?

MR. WRIGHT: I have brief comments, Your Honor, as I informed the court earlier, was going to call a witness. Mr. Marshall and I were able to reach a stipulation, and which I would like to dictate for the record, and then I'll comment very briefly, if I might.

THE COURT: This is about the presentence report?

MR. WRIGHT: Yes, sir.

THE COURT: Or related to it?

MR. WRIGHT: It pertains to it, yes, sir.

The stipulation is that at least ninety-five per cent -- well, I'm not saying that right -- at least ninety-five per cent of the weight of the liquid seized at the McCormick Mountain Drive address was solvents. I believe that's what we offered to stipulate to.

MR. MARSHALL: Weight or volume.

MR. WRIGHT: Weight or volume.

MR. MARSHALL: Specifically, Your Honor, that relates to the guidelines in that the probation officer computed the weights of certain liquids that were found at the speed lab site, as the court will recall from the testimony at the trial on the motions hearing.

And it computed those into the base level offense. The chemist would testify, as Mr. Wright has indicated, that over ninety-five per cent of the volume or weight of those liquids contained solvents. The rest was methamphetamine or P2P or percentage was methamphetamine or P2P.

MR. WRIGHT: That's the stipulation, Your Honor.

THE COURT: All right.

MR. WRIGHT: And also, I want to request that the court take judicial notice of certain testimony at the trial of Wayne Walker and Joe Guerra, specifically the testimony of the four chemists who are Anthony Arnold, Ralph Owen, Bobby Urbanovsky, I believe is how he says it, and Glen Carl Harbison.

And also, part of our objections to the factual basis of

NO. 92-5257

Supreme Court, U.S.
FILED
JUL 23 1992
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

ORIGINAL

Robert Wayne Bouvier, Petitioner

vs.

United States of America, Respondent

CERTIFICATE OF SERVICE

Pursuant to Rule 29(5)(b), Supreme Court Rules, I certify that each of the parties listed below are all the parties required to be served, and were mailed copies of the briefs, this certificate, and Motion to Proceed *In Forma Pauperis* by depositing same in the United States mail this the 22nd day of July, 1992.

Solicitor General
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202/514-2000
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512/472-8355
ATTORNEY FOR JOE GUERRA

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

Robert Wayne Bouvier, Petitioner

vs.

United States of America, Respondent

PROOF OF SERVICE

The undersigned counsel of record for Petitioner Robert Wayne Bouvier hereby certifies that on this the ___ day of July, 1992, true and correct copies of the foregoing Petition for Writ of Certiorari with Appendix, and the foregoing Motion for Leave to Proceed In Forma Pauperis, have been served by depositing the same in a United States Office or mailbox, with first class postage prepaid, addressed to counsel of record of all parties required to be served, at their proper post offices addresses as follows:

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By: _____
David A. Wright
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ATTORNEYS FOR ROBERT WAYNE BOUVIER

OPPOSITION BRIEF UNAVAILABLE FOR FILMING AT THIS TIME

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OCT 14 1992

NO. 92-5257

Supreme Court, U.S.
FILED
OCT 15 1992
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

Robert Wayne Bouvier, Petitioner

vs.

United States of America, Respondent

REPLY BRIEF OF ROBERT WAYNE BOUVIER TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO. 92-5257

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

Robert Wayne Bouvier, Petitioner

vs.

United States of America, Respondent

Respectfully submitted,

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COUNSEL FOR PETITIONER

SERVICE TO:

Solicitor General
Department of Justice
Washington, D.C. 20530
July 22, 1992

QUESTION PRESENTED:

WHETHER THE WEIGHT OF TOXIC WASTE MATERIAL, WHICH IS THE BYPRODUCT OF A DRUG MANUFACTURING PROCESS, SHOULD BE INCLUDED IN THE CALCULATION OF A DEFENDANT'S BASE OFFENSE LEVEL UNDER FEDERAL SENTENCING GUIDELINES § 2D1.1.

NO. 92-5257

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

Robert Wayne Bouvier, Petitioner

vs.

United States of America, Respondent

**REPLY BRIEF OF ROBERT WAYNE BOUVIER
TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

Robert Bouvier respectfully files this his Reply Brief To Brief For The United States In Opposition To Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit.

ARGUMENT FOR ALLOWANCE OF WRIT

The United States in its Brief in Opposition to this Writ admits that there is a split of authority among the circuits as to the calculation of drug amount to determine a defendant's base offense level under the Federal Sentencing Guidelines. Although the Government has interpreted the decision of this Court in Chapman v. United States, 111 S.Ct. 1919 (1991) to be consistent with its position, the Second, Sixth, Ninth and Eleventh Circuits have all considered and rejected the position now taken by the Government.[1] To accept the argument of the Government and deny certiorari would serve only to perpetuate a system in which the length of the sentence imposed upon a person accused of a violation of controlled substance laws would vary widely depending upon the Circuit in which he was charged. The position of the Government would further frustrate the objective of Congress in enacting the Sentencing Reform Act of 1984 to impose reasonable uniformity in sentencing by narrowing the wide disparity of sentences imposed for similar offenses by similar offenders.

Movant further takes exception to Footnote 2 of the Brief For The United States In Opposition regarding Mr. Bouvier's proper base offense level under the Sentencing Guidelines. Apparently, the Government requests this Court assume that the one hundred forty-six (146) grams of methamphetamine seized was "actual" (a word not used in the Drug Quantity Table) or "pure" methamphetamine. The Government has no evidence to suggest anything to support their assertion concerning the quality of the methamphetamine seized. Obviously, a consideration of the quality of methamphetamine for sentencing purposes would be a factual question for consideration by the trial court and has no relevance to this Court's consideration of this petition. In truth, the proper application of drug amount to base offense level in Mr. Bouvier case would

[1] United States v. Acosta, 963 F.2d 551 (2nd Cir. 1992); United States v. Touby, 909 F.2d 759 (3rd Cir.), aff'd on other grounds, 111 S. Ct 1752 (1991); United States v. Jennings, 945 F.2d 129 (6th Cir. 1991); United States v. Rolande-Gabriel 938 F.2d 1231 (11th Cir. 1991).

result in an offense level of 26 and not 32 as asserted by the Government.

CONCLUSION

The petition should be granted in this case to correct the Fifth Circuit's misinterpretation of the Federal Sentencing Guidelines and to settle the discrepancy among the circuit courts concerning sentencing for controlled substance offenses.

Respectfully submitted,

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NO. 92-5257

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

Robert Wayne Bouvier, Petitioner

vs.

United States of America, Respondent

PROOF OF SERVICE

The undersigned counsel of record for Petitioner Robert Wayne Bouvier hereby certifies that on this the 12th day of October 1992, true and correct copies of the foregoing Reply Brief To Brief For The United States In Opposition To Petition For Writ Of Certiorari To The United States Court of Appeals For the Fifth Circuit have been served by depositing the same in a United States Office or mailbox, with first class postage prepaid, addressed to counsel of record of all parties required to be served, at their proper post offices addresses as follows:

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ATTORNEYS FOR ROBERT WAYNE BOUVIER

SUPREME COURT OF THE UNITED STATES

92–5184 WAYNE EUGENE WALKER
v.
UNITED STATES

92–5188 JOE GUERRA
v.
UNITED STATES

92–5257 ROBERT WAYNE BOUVIER
v.
UNITED STATES

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Nos. 92–5184, 92–5188 AND 92–5257. Decided November 2, 1992

The petitions for writs of certiorari are denied.

JUSTICE WHITE, with whom JUSTICE BLACKMUN joins, dissenting.

These three petitions raise a single issue: Whether the weight of waste products that are the byproduct of a drug manufacturing process and that contain a detectable amount of a controlled substance should be used for sentencing purposes under §2D1.1 of the United States Sentencing Commission Guidelines Manual (1990). The product in question was a toxic liquid substance consisting of phenylacetone and a small percentage of methamphetamine. At Joe Guerra's and Wayne Walker's trial, a chemist testified that the liquid was probably a waste product left over from the methamphetamine manufacturing process. Robert Bouvier pleaded guilty and, at his sentencing hearing, the government stipulated that over 95 percent of the weight of those liquids was solvents. Petitioners contend that their sentences should

not have been based on the total weight of the liquid. The Fifth Circuit rejected their argument. 960 F. 2d 409 (CA5 1992).

As I noted in *Fowner* v. *United States*, 504 U. S. ___ 1998 (1992) (WHITE, J., dissenting from denial of certiorari), the Courts of Appeals are in serious disagreement over this issue. Since that time, the Second, Third, and Ninth Circuits have joined the ranks of the Sixth and Eleventh Circuits in adopting the approach advocated by petitioners. See *United States* v. *Rodriguez*, Nos. 91–5455, 91–5494, and 91–5751, 1992 U. S. App. LEXIS 22744 (CA3, Sept. 18, 1992); *United States* v. *Robins*, 967 F. 2d 1387 (CA9 1992); *United States* v. *Salgado-Molina*, 967 F. 2d 27 (CA2 1992); *United States* v. *Acosta*, 963 F. 2d 551 (CA2 1992). In contrast, this case confirms the Fifth Circuit's alignment with the First and Tenth Circuits' position. See *United States* v. *Lopez-Gil*, 965 F. 2d 1124 (CA1 1992); *United States* v. *Sherrod*, 964 F. 2d 1501 (CA5 1992); *United States* v. *Dorrough*, 927 F. 2d 498 (CA10 1991).

Respondent acknowledges the existence of this split, but points to the actions of this Court as evidence that plenary consideration is unwarranted. Indeed, in the last Term alone, we have declined to review this question on three separate occasions. See *Fowner*; *Beltran-Felix* v. *United States*, 502 U. S. ___ (1992); *Mahecha-Onofre* v. *United States*, 502 U. S. ___ (1991).

I believe it is high time to resolve this enduring conflict that makes a defendant's sentence depend upon the circuit in which his or her case is tried. I therefore would grant certiorari.